FREE COPY

Supreme Court, U. S.
FILED
FEB 27 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AMICUS CURIAE

JONATHAN L. ALPERT
IRMA ROBBINS FEDER
RICHARD YALE FEDER
WARREN S. SCHWARTZ
c/o American Civil Liberties
Union of Florida
19 West Flagler Street
Miami, Florida 33130
Attorneys for Amicus Curiae

MIAMI REVIEW — 371-4853 — 377-3721

TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	2
STATUTE INVOLVED	2
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. Florida Statute §104.38 Abridges Freedom of The Press	3
A. Introduction	3
B. The Columbia Broadcasting System Case	6
II. The "Right-of-Access" Theory Abridges The First Amendment	10
A. Economic Factors	10
B. Effects of Free Exchange of Information and Opinion	14
C. Historical Considerations	18

TABLE OF CONTENTS (cont.)

		Page
III.	Additional Grounds for Invalidating Statute	20
	A. Void for Vagueness	20
	B. Overbreath	23
	C. Chilling Effect	25
	D. "Less Drastic Alternative" Doctrine	26
	E. The Missing Requirements of "Truth" and "Fair Comment"	28
CONCLUSION		30
CERTIFICATE OF SERVICE		31

TABLE OF AUTHORITIES

CASES

	Page
Abrams v. United States, 250 U.S. 616 (1919)	5
Baggett v. Bullitt, 377 U.S. 360 (1964)	25
Bridges v. California, 314 U.S. 252 (1941)	5
Columbia Broadcasting System v. Democratic National Committee, 36 L.Ed.2d. 772 (1973)	6 et seq.
Connally v. General Construction Company, 269 U.S. 385 (1926)	21
Craig v. Harney, 331 U.S. 367 (1947)	5
Curtis Publishing Company v. Butts, 388 U.S. 130 (1967)	5, 18
Dombrowski v. Pfister, 380 U.S. 479 (1965)	25
Dunn v. Blumstein, 405 U.S. 330 (1972)	27
Giancano v. Pennsylvania, 382 U.S. 399 (1966)	22

TABLE OF AUTHORITIES (cont.)

CASES

	Page
Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963)	25
Griswold v. Connecticut, 381 U.S. 479 (1965)	27
Grosjean v. American Press Company, 297 U.S. 233 (1936)	5
Herndon v. Lowry, 301 U.S. 242 (1937)	22, 23
Mills v. Alabama, 384 U.S. 214 (1966)	5, 15
NAACP v. Button, 371 U.S. 415 (1963)	24, 25, 27
Near v. Minnesota, 283 U.S. 297 (1931)	5
New York Times v. Sullivan, 376 U.S. 254 (1964)	5, 14, 18, 26, 28
New York Times v. United States, 403 U.S. 713 (1971)	5
Palmer v. City of Euclid, 402 U.S. 544 (1971)	21

TABLE OF AUTHORITIES (cont.)

CASES

	Page
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)	21, 22, 23
Pennekamp v. Florida, 328 U.S. 331 (1946)	5
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	7
Rosenblatt v. Baer, 383 U.S. 75 (1966)	18
Rosenbloom v. Metromedia, 403 U.S. 329 (1971)	5, 18, 26, 28
Shapiro v. Thompson, 394 U.S. 618 (1969)	27
Shelton v. Tucker, 364 U.S. 479 (1960)	27, 28
Speiser v. Randall, 357 U.S. 513 (1958)	25
Thornhill v. Alabama, 310 U.S. 88 (1940)	23
U.S. v. Cohen Grocery, 255 U.S. 81 (1921)	22

TABLE OF AUTHORITIES (cont.)

CASES

Page

United States v. Reese,
92 U.S. 214 (1876) 22, 23

Wolf v. Selective Service Local Board #16.
372 F.2d. 817 (2d. Cir. 1967) 25

CONSTITUTIONAL PROVISION

UNITED STATES CONSTITUTION
First Amendment ..... 3 et seq.

STATE STATUTES

FLORIDA STATUTES
§104.38 ..... 2 et seq.
§770.02 17

OTHER AUTHORITIES

L. Levy, *Freedom of Speech and Press in Early American History: Legacy of Suppression* 4 18

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,
Appellant,

v.

PAT L. TORNILLO, JR.,
Appellee.

On Appeal from the Supreme Court of Florida

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA, AMICUS CURIAE

INTEREST OF AMICUS

This Brief is filed (with the parties' consents previously filed in this Court) by the American Civil Liberties Union of Florida pursuant to Rule 42. The American Civil Liberties Union of Florida is a nonpartisan organization with the sole purpose of protecting the Bill of Rights. Amicus is particularly interested in the outcome of this case because the Florida Statute involved, §104.38, and the decision of the Florida Supreme Court holding the statute constitional, deleteriously affect the conduct of elections and freedom of press in the State of Florida.

STATUTE INVOLVED

Florida Statutes §104.38:

> Newspaper assailing candidate in an election; space for reply. — If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicious a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to reply with the provisions of this section shall be guilty of a misdemeanor of the first degree, punishable as provided in §775.082 or §775.083.

SUMMARY OF ARGUMENT

The statute involved in this case, by granting a "Right of Reply" or "Right of Access", clearly breaches the freedom of press guarantee of the First Amendment. Such right to access exercised by any individual results in corresponding reduction in the freedom of the print media to print or not as they so desire.

The First Amendment interdiction of governmental interference with this country's free press conclusively and completely bars the entry of the State into the editorial board rooms and journalistic newsrooms of all newspapers. By granting political candidates a right to space in newspapers, the Florida Legislature and Supreme Court effectively curtailed, abridged and eliminated freedom of the press in Florida.

ARGUMENT

I

THE FLORIDA STATUTES §104.38 ABRIDGES FREEDOM OF THE PRESS

A. Introduction

All parties herein concede that this is a case of first impression before this Court and that no such statute has ever been held Constitutional before.

The Florida Supreme Court and Tornillo assert the novel position that the Florida right to reply statute "implements" freedom of the press rather than restraining

it because the statute aids the free flow of information and ideas and thus enhances the public's right to know.[1]

In the first place, no semantic exercise can change the obvious fact that the statute restrains or abridges private newspapers' freedom to print or not to print as they see fit and does not "implement" freedom of the press.

In the second place, the Florida statute does not benefit the public's right to be informed.

In the third place, whether or not the statute "implements" or inhibits the free flow of information is irrelevant to the statute's constitutionality or lack thereof because the Constitutional prohibition against any "law . . . abridging the freedom . . . of the press" does *not* make an exception for laws-abridging-freedom-of-press with the purpose of enhancing the public's right to know.

The very language of the First Amendment demonstrates the framers' determination that a governmentally unfettered right to print or not to print is the best means for assuring the people's right to know, the considered judgment that a constitutional wall separating newspapers and government is the best means for protecting and encouraging the free flow of information. The very language of the First Amendment explicitly rejects a compulsory governmental press, a governmentally-determined "responsible" press, a governmentally-insured "accurate" press or a governmentally-guaranteed "freedom of access to press."

---

[1]See e.g. Appellee's Response to Appellant's Jurisdictional Statement . . . (hereinafter called App. Response), pp. 9, 14-15.

The underlying basis for the First Amendment is that truth best emerges in a free marketplace of ideas.[2] Therefore, all Americans — liberal or conservative, reactionary or radical, black or white, rich or poor, majority or minority — must have the right to print or not to print and to read or not to read "the truth" as they see it, free from governmental interference. In other words, the function of newspapers in exposing and evaluating government weaknesses and strengths cannot be accomplished if government itself is to determine "the truth" or require newspapers to print specified matter.

The basis of the First Amendment is the separation of the press and the government. If Tornillo is correct or if Tornillo's position represents sound public policy, then the proper forum for Tornillo is the Congress and the State Legislatures to modify, alter or repeal the First Amendment. If each citizen has a "right-to-know" paramount to the freedom of the press, then the First Amendment should be properly altered by amendment.

The First Amendment, however, prohibits laws allegedly aiding the public's right to know if and when they abridge freedom of the press.[3] Similarly, the First

[2]See e.g. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (dissenting op., Holmes, J.).

[3]See e.g. *Near v. Minnesota*, 283 U.S. 297 (1931) and *New York Times v. United States*, 403 U.S. 713 (1971) (prior restraints); *Bridges v. California*, 314 U.S. 252 (1941), *Pennekamp v. Florida*, 328 U.S. 331 (1946), *Craig v. Harney*, 331 U.S. 367 (1947), and *Mills v. Alabama*, 384 U.S. 214 (1966) (subsequent punishments); *Grosjean v. American Press Company*, 297 U.S. 233 (1936) (discriminatory taxes); *New York Times v. Sullivan*, 376 U.S. 254 (1964), *Curtis Publishing Company v. Butts*, 388 U.S. 130 (1967), and *Rosenbloom v. Metromedia*, 403 U.S. 329 (1971) (inhibiting forms of libel actions).

Amendment in no way imposes or permits any legal duty on the press to inform the public and does not enforce any duty on the public to be informed.

Just as our Constitution presently rejects voting as a citizen's compulsory duty in favor of voting as a citizen's right (subject to personal option to exercise or not), so too it rejects a compulsory "informed" public. In both instances, the implicit premise is that some ultimate democratic goals, such as elections involving all eligible citizens, all of whom are totally informed, cannot be achieved by governmental compulsion.

As suggested previously, the *reductio ad absurdum* of the position taken by the court below and Tornillo would be, in addition to compulsory printing in the name of "access to media," another Florida statute involving compulsory reading in the name of "the free flow of information." Amicus contends that both are equally incompatible with democracy, that neither would further the legitimate interest in fair and honest elections, and, most important, that both reject freedom of the press as guaranteed by the Constitution in favor of a new esoteric and unworkable experiment to be undertaken by judicial interpretation rather than Constitutional Amendment.

B. The Columbia Broadcasting System Case.

In *Columbia Broadcasting System v. Democratic National Committee*, 36 L.Ed. 2d 772 (1973), this Court held that radio and TV broadcast licensees' policy against accepting paid editorial advertising does not violate the First Amendment and/or the Federal Communications Act (Mr. Justices Brennan and Marshall dissenting). Disagreement

among the Justices arose because the existing "hybrid" system of government regulation of private radio and TV due to limited broadcast frequencies raised serious questions concerning "governmental action" under the First Amendment. Such questions are irrelevant in this case because, as the *CBS* opinions explicitly point out, newspapers are not and cannot be so governmentally regulated under our Constitution.

Thus in Part I of the opinion of the Court, six Justices retiterated with approval the *Red Lion* proposition that "it is idle to posit an unabridgeable First Amendment to broadcast comparable to the right of every individual to speak, write, or publish."[4] Similarly, in the dissenting opinion, two Justices also cited the same *Red Lion* language.[5] The one remaining Justice deemed the First Amendment equally applicable to private radio and TV broadcasters as to private newspapers, banning "access" law or any other law that abridges freedom of the press in both instances.[6]

Futhermore, although a majority of this Court permits some government regulation of radio and TV in view of the "inherent physical limitation" involved (i.e., "Broadcast frequencies are a scarce resource"),[7] no mem-

[4]*Columbia Broadcasting System* case, *supra* (hereinafter *CBS*), 36 L.Ed. 2d at 783 (Opinion of the Court, Part I, quoting from *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 388 (1969).

[5]*CBS*, 36 L.Ed. 2d at 839 (dissenting op., Brennan, J.).

[6]*CBS*, 36 L.Ed. 2d at 809 (separate op., Douglas, J.); See also at 801 (separate op., Stewart, J.).

[7]*CBS*, 36 L.Ed. 2d at 783 (Opinion of the Court, Part I); see also at 790 (Opinion of the Court, Part III), at 797 (Opinion of the Court, Part IV), at 802 (separate opinion, Stewart, J.), at 829 and 838 (dissenting opinion, Brennan, J.), and cf. at 815-816 (separate opinion, Douglas, J.).

ber of this Court would permit similar governmental regulation of private newspapers based on alleged economic limitations (i.e., newspapers' alleged "monopolistic influence" as relied on by the court below in response to Tornillo's plea[8]).

For example, Part I of the Court's opinion stated that "All who possess the financial resources and the desire to communicate by television or radio cannot be satisfactorily accommodated" on account of the scarce natural resource,[9] thus justifying in effect an abridgeable or non-absolute right to broadcast. (Clearly all who possess the money and wish to communicate by printing newspapers *can* do so.).

As set forth by Mr. Chief Justice Burger in Part III, the First Amendment does not allow infringement of newspapers' freedom on the ground that some Americans who want to publish are not rich enough to do so:[10]

> "The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers — and hence advertisers — to assure financial success; and second, the journalistic integrity of its editors and publishers."

---

[8] *Tornillo v. The Miami Herald Publishing Company,* So. 2d (July 18, 1973); Jurisdictional Statement, Appendix A, pp. App. 8-9.

[9] *CBS,* 36 L.Ed. 2d at 783 (Opinion of the Court, Part I).

[10] *CBS,* 36 L.Ed. 2d at 792 (Opinion of the Court, Part III).

In analagous fashion, Mr. Justice Douglas' separate opinion states that with respect to daily newspapers "it would be virtually impossible for a competitor to enter the field due to the financial exigencies of this era" but nevertheless takes the position that the First Amendment does not permit " 'some' laws 'abridging' freedom of the press."[11]

Again, Mr. Justice Stewart's concurring opinion specifically rejects the argument that newspapers should be "compelled to open their pages to all comers" or to "dissident voices" or to "responsible" dissident voices, and rejects any such argument even if "there was a single newspaper in a particular community":[12]

> "For that guarantee [of the First Amendment] gives every newspaper the liberty to print what it chooses and reject what it chooses, free from the intrusive editorial thumb of Government."

Lastly, the dissenting opinion of Mr. Justice Brennan, in which Mr. Justice Marshall joined, also proscribed governmental regulation of newspapers despite economic disparity:

> "The decision as to who shall operate newspapers is made in the free market, not by Governmental fiat. The newspaper industry is not extensively regulated and, indeed, in light of the differences between the electronic and printed media, such regulation would violate the First Amendment with respect to newspapers."[13]

---

[11] *CBS*, 36 L.Ed. 2d at 816 (separate op., Douglas, J.).

[12] *CBS*, 36 L.Ed. 2d at 808 (separate op., Stewart, J.).

[13] *CBS*, 36 L.Ed. 2d at 829 (dissenting op., Brennan, J.).

Returning now to the facts of the *CBS* case, in Part IV of the Court's *CBS* opinion, five Justices concluded that neither the public interest standard of the Federal Communications Act nor the First Amendment "requires broadcasters to accept editorial advertisements" and consequently rejected the limited right of access requested by the Democratic National Committee;" Regimenting broadcasters is too radical a therapy for the ailments respondents complain of."[14] Most assuredly, Florida's Right to Reply Statute and Tornillo's right-of-access to *newspapers* theory both involve regimenting newspapers to an incredible degree, a degree far greater than that already rejected by this Court for broadcasters.[15]

II

THE "RIGHT-OF-ACCESS" THEORY ABRIDGES THE FIRST AMENDMENT

A. Economic Factors

The main thrust of Tornillo's argument is that the First Amendment coupled with today's economic conditions guarantees or at least does not prohibit a right of access to newspapers by assailed political candidates, and that Florida's Right to Reply Statute is constitutional because our free enterprise system has yielded a giant newspaper

---

[14]*CBS*, 36 L.Ed. 2d at 794-797 (Opinion of the Court, Part IV); see also at 807-808 (separate op., Stewart, J.) and quoted material in text accompanying fn. 12 of this Brief as well as at 817-819 (separate op., Douglas, J.: "the laissez faire regime which the First Amendment sanctions" renders the Fairness Doctrine imposed on broadcast licensees improper, leastwise any governmental-compulsory-access-to-newspaper media.

[15]*CBS*, *supra*.

industry and monopolization rendering it all but impossible for the average citizen and minority group to reach the public through print:

> ". . . In this law, the Legislature, in 1913 (!) decided that the owners of the printing presses had (already) achieved such political clout that when they (the publishers) engaged in character assailings, the victims' electoral chances were unduly and improperly diminished . . . For these reasons and *to avoid a hit-run election stratagem, concocted by one candidate and a dominant newspaper*, the Legislature in F.S. 104.38 gave the victim of the press' acerbic pen, a limited opportunity to respond to the same people who read the attack against him.
>
> "There can hardly be anything Communistic about that!!"
>
> (Brief of Appellant Tornillo in the Supreme Court of Florida, pp. "xi" and "xii," original emphasis)

If Tornillo had a tenable position, it would not be necessary to bandy about the term "Communistic." Regardless of Tornillo's views about Communism, it is simply not constitutional to deprive a newspaper publisher of his private property (newspaper space) without just compensation (or indeed any compensation), nor is it constitutional to give some Americans the right to "buy" private newspaper space for free and even if the property owner doesn't want to "sell" it.

Amicus suggests that constitutional remedies for those Americans who desire more access to private newspaper media and cannot afford to reach the audience they wish would include working for economic betterment or reform *within* our Constitutional system.[16]

Assuming arguendo that the goals sought to be achieved by Tornillo are desirable, mere economic size does not a Constitution unmake. There are numerous ways in which candidate Tornillo could have presented his case to the electorate in his district (not all of Dade County) without infringing upon the freedom of the editors and publishers of the *Miami Herald* to speak their minds. Tornillo could have hired halls, spoken to individual voters, distributed leaflets and pamphlets, or strived for change within our constitutional system to enable him to speak his mind to his particular group of voters without tampering with the First Amendment.

The particular defendant presented to this Court involves an inviting target — the extremely popular and widely circulated *Miami Herald*. The Right of access to the smaller newspapers in Dade County (and there are many) or the "newspapers" published by private organizations in Dade County (and there are many) is not of immediate interest to the parties. This Court, however, will be deciding the fate of these smaller newspapers and organizations "newspapers" too.

---

[16]Parenthetically, Constitutional remedies for one who desires more access and also advocates some Marxist principles would include trying to persuade a majority of Americans to agree through First Amendment peaceful means of persuasion and legally striving for pertinent Constitutional Amendments; asking any Court to amend our First Amendment is an improper remedy under our Constitutional system.

Although the *Miami Herald*, economically speaking, might be able to survive free space for a right to reply for political candidates, it is highly questionable whether the *Dade Democrat* (the publication of the Dade County Young Democrats) or the *Classroom Teacher* (the newspaper publication of the organization with which Mr. Tornillo is affiliated)[17] would also be able to survive. What will be the effect of the Florida Statute upon the *Coral Gables Times*, the *Greater Miami Journal*, the *North Dade Journal*, the *Liberty City News*, and the many other small newspapers in Dade County, if the Statute is upheld, invoked with increasing frequency, and enforced with merely appropriate effort (leastwise with zealous dedication)?

Equally important, economically speaking, is the strong possibility that one reason for the *Miami Herald's* wide circulation is its exposure and evaluation of "official" records and "candidates" such as Mr. Tornillo, and that one reason for the continued existence of the numerous small papers in Dade County is their appeal to their readers on the basis of their particular viewpoints. In all probability the *Miami Herald's* readership and circulation would diminish if it were forced to give all such persons a right of reply, thereby diluting the *Miami Herald's* editorial spleen; certainly the (Dade County) *Jewish Floridian* would lose a substantial portion of its subscribers if it were compelled to print "replies" of candidates supporting the anti-Israel "Palestine Liberation Front" and the *Miami Times* (published by and for Dade County's black residents) would soon go out of business if it were compelled to print "replies" of candidates advo-

[17]It should be noted that Appellee Tornillo has total access to this newspaper which goes to some 8,000 of the 12,000 teachers in Dade County.

cating segregated public schools, etc.! Requiring newspapers to become community bulletin boards rather than strong and independent voices in the community, however unpopular or unusual, would mean economic death of newspapers as they now exist. (Whether or not there is a ready market for "community bulletin boards" is an economic question whose answer is unknown to Amicus and irrelevant to decision of the case at bar, though it may be of interest to enterprising Americans looking for the proverbial road from rags to riches).

Additionally, just as a relatively poor person is constitutionally entitled to run for public office, but he is not constitutionally entitled to compel a crowd of listeners to gather to hear him in an auditorium . . . and receive bus or cab fare for such listeners from the government, so too such a person should not be constitutionally entitled to gather the same listening or reading audience through the unwilling columns of a daily newspaper . . . and to do so at the publisher's expense. Economic size cannot be a constitutional criterion for access. The bully is as entitled to speak and print freely as the meek, the powerful as entitled as the weak, and vice-versa under our Constitution, without regard to high or low financial status.

B. Effects on the free exchange of information and Opinion

The primary fallacy in Tornillo's argument, however, is not the Florida Statutes' deleterious effect on the newspapers' economic profits but instead the Right to Reply law's destructive effect on the free, "uninhibited, robust and wide-open"[18] discussion of governmental affairs.

[18] *New York Times v. Sullivan, supra,* at 270.

Thus enforcement[19] of the Florida Statute means no newspaper can print any critical evaluation of any candidate for nomination or election without inviting or risking the right to reply under one or more of the law's four subsections.

The only two ways for a newspaper to avoid the Statute (assuming arguendo it is not void for vagueness) would be (1) to print a list of candidates supported with no further comment, no rhyme or reason for the newspaper's support, or (2) to eliminate from the newspaper's columns, editorials, etc. all information and evaluation concerning candidates and their attitudes or actions which might conceivably be deemed to *assail their personal characters* or to *attack their official records*, i.e., to cut all candidate-and-record assessments encompassing any criticism whatsoever. Obviously neither of the above avoidance methods would inure to the benefit of the public's right to know, nor would such self-censorship help secure fair and honest elections.[20]

If, on the other hand, the average Floridian newspaper decided to invite and print all the required reply-material-in-similar-space-and-type, the newspaper would soon lose those readers interested in particular points of view, those readers interested in "the truth" as their chosen newspaper sees it, those readers disinterested in commu-

[19]The case at bar is apparently the second ever having been brought under the Florida Statute, and the first case in which the Statute was held constitutional by any Florida Court. Jurisdictional Statement, p. 6. In view of the nationwide publicity and interest in this case, a decision by this Court upholding the Statute would inevitably result in constant massive recourse to the Statute and assiduous enforcement thereof by the Florida courts.

[20]Cf. *Mills v. Alabama*, *supra*, at 219.

nity billboards advancing all points of view and exercising neutrality rather than editorial judgment. This kind of compliance with the Florida Statute would not increase the free flow of information and opinion nor make elections more fair and honest.

The political campaign is a central feature of a democracy. But this fact does not support Tornillo's view that a Right to Reply is peculiarly compelling; this fact supports Appellant's position because government regulation of newspapers' political commentary, however innocent it may seem to some at first blush, is indeed the prelude to dictatorship through suppression of full and free discussion of political concerns.

No free marketplace of ideas can coexist with compulsory access to private newspaper media, and no election can be fair and honest when the free marketplace of ideas is decreased or destroyed:

> "' . . . any effort to solve the broader problems of a monopoly press by forcing newspapers to cover all "newsworthy" events and print all viewpoints, under the watchful eyes of petty public officials is likely to undermine such independence as the press now shows without achieving any real diversity.' The System of Freedom of Expression. (1970), p. 671"[21]

The decision below is particularly reprehensible to the entire function and meaning of the democratic process. At the heart of the democratic process is the election. At the

[21] *CBS*, 36 L.Ed. 2d at 811 (separate op., Douglas, J., quoting "Thomas I. Emerson, our leading First Amendment scholar").

heart of each election is each person's opinion. At the heart of each person's opinion is the right of every person, every group and every newspaper to express a view on every candidate no matter how outrageous that view may be and subject only to the applicable law of libel.

The editors of the *Miami Herald* are as entitled to express their opinions through their columns without government interference as much as any individual is entitled to express his opinion verbally or in print without government interference. If Tornillo may require the *Miami Herald* to print his replies today, then he can require each individual who speaks against him to speak his replies tomorrow. What Tornillo really seeks is not a "right-of-reply" (which by any constitutional standard is untenable and by any practical standard is unworkable), but a right to stifle and shield government and politicians from legitimate public inquiry and comment.

A subsidiary legal argument relied on by Tornillo merits brief attention.

Tornillo has managed to confuse Florida's Right to Reply candidates' *access* law with some imaginary right-to-reply-to-*libel* legislation not involved in the case at bar and not now before this Court.[22] The Florida Statute in no way requires libel before its prescribed right-to-reply comes into play. Moreover, Tornillo did not sue as a "libel plaintiff" in the instant case, has not sued the *Miami Herald* in any civil libel action grounded on the editorial involved herein, and has not sought a retraction under a separate Florida libel Statute (§770.02), providing for limited libel damages if the losing defendant printed the

[22]See e.g. App. Response, pp. 10 et seq.

winning plaintiff's requested retraction. Whether or not the recent case-law establishing the new "public law of libel" so deplored by Tornillo[23] should be judicially modified is irrelevant in the case at bar. Surely Tornillo's objections to this Court's extensions of the *New York Times* rule limiting libel actions against newspapers cannot support Tornillo's contention that the Florida non-libel access Statute is thereby rendered constitutional even though it abridges freedom of the press.

C. Historical Considerations

Although "no citizen, and certainly no jurist worthy of his position, would or should conclude his judgment on either a constitutional question or a matter of public policy by an antiquarian examination of the original meaning of the freedom of speech-and-press clause," L. Levy, *Freedom of Speech and Press in Early American History; Legacy of Suppression* 4, a short comment on Appellee's argument is indicated.

The argument has been made that the framers of the First Amendment, who intended and required separation of the press and the government, and chose not to provide "freedom of access" to the press by aggrieved citizens or politicians, should be "overruled" because neither Tornillo nor the *Miami Herald* were in existence at the time nor were the economic conditions that spawned them both. Since it is true that (1) the First Amendment was written in the late 18th century for an agrarian rural society, not

---

[23]See e.g. Response, p. 12, referring to *New York Times v. Sullivan, supra, Rosenblatt v. Baer*, 383 U.S. 75 (1966), *Curtis Publishing Company v. Butts, supra*, and *Rosenbloom v. Metromedia, supra.*

a highly industrialized urban one, that (2) many small newspapers existed then in even the tiniest towns and cities, and that (3) the small franchise and population size permitted each citizen to make his/her views known from his/her own soapbox, then freedom of access to private newsprint was not and would not have been a real issue before drafters of the First Amendment. So the argument runs.

As a matter of fact, the framers of our Constitution *did* consider the access question before rejecting it in favor of our present First Amendment. To illustrate, Benjamin Franklin, an active participant in Constitutional framing and the pre-eminent printer and newspaper publisher of his day, carefully explained that his paper was his to mold and was not to be shared like "a stagecoach with seats for all."[24]

As another matter of fact, the 5 million or so inhabitants of the 13 colonies in 1774 had less access to information than we 250 million Americans have in 1974. Two hundred years ago telephone, telegraph, radio, television, air mail, railways, and even traversible highways did not exist. Delays of weeks or occasionally months occurred in mail delivery. Dangers from the elements, highwaymen, etc. did not help communication. The non-existence of universal education and the resulting lowered literacy impeded access. The limitations on the electorate to male property owners left a majority of adult Americans forbidden to vote and lessened the motivation of some with respect to learning about public affairs.

---

[24] *CBS*, 36 L.Ed. 2d at 811-812, see text accompanying fn. 2 (separate op., Douglas, J.).

Thus, historically comparing the availability of news, opinions and ideas of 1974's American to 1774's American reveals the insignificance of today's alleged decrease in the number of privately owned newspapers and alleged increase in the economic costs of publishing such a paper.

III

ADDITIONAL GROUNDS FOR INVALIDATING STATUTE

A. Void For Vagueness

Florida Statutes §104.38 fails to provide adequate notice to persons of ordinary intelligence as to what conduct is forbidden. The statute mandates a reply "if a newspaper . . . assails the personal character of any candidate . . . " without delineating what constitutes an "assault" or what constitutes "personal character." Is it an assault to say that a man simply is not big enough to fill a particular office? Is personal character attacked by endorsing one candidate over another? Is it an assault on personal character to state that a candidate has been convicted of a crime when in fact he has been convicted of a crime?

The dissenting opinion of Florida Supreme Court Justice Boyd in the case *sub judice* suggested that there are some important questions left unanswered by this statute:

> "Does the law include both news stories and editorial comments? If a story mentions a 'situation,' but does not mention the candidate by name, may he reply? When the publisher knows the

> statements are true must he publish a statement by the candidate which he knows to be false? If the reply of the candidate libels other persons, must the publisher print it and, if so, is the publisher subject to liability for any resulting libel suit? If the candidates reply were to contain obscene language, would the publisher still have to print it — and thereby invite prosecution under obscenity laws?"
>
> *Tornillo v. The Miami Herald Publishing Co.*, — So.2d — (1973), (Jurisd. Statement, App. pp. 22-23A).

Where a state seeks to regulate, the due process clause requires that the statute authorizing such intrusion be cast in language that is clear and unambiguous. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Connally v. General Construction Company*, 269 U.S. 385 (1926). This Court has declared:

> "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391.

Clarity and precision serve two critical functions. First, it assures that those who may be affected so seriously have notice of behavior which will subject them to the State's interference. *Connally v. General Construction Co., supra.* Second, the proscription against vagueness

serves to prevent courts and other official authorities from enforcing a statute in a wholly subjective manner. *Giancano v. Pennsylvania*, 382 U.S. 399 (1966); *U.S. v. Cohen Grocery*, 255 U.S. 81 (1921) and *Herndon v. Lowry*, 301 U.S. 242 (1937).

This prohibition of vagueness is based upon notions of due process and fundamental fairness which must attend any state regulation. The concept of vagueness has been used by the Courts in many different ways, two of which are controlling here:

1. A penal statute must give adequate notice of the conduct proscribed. *In Papachristou v. Jacksonville, supra*, this Court struck down a vagrancy ordinance. It held:

> "This ordinance is void-for-vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,' . . . and because it encourages arbitrary and erratic arrests and convictions." (Citations omitted)

The Court further quoted a much earlier opinion:

> "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the court to step inside and say who could be rightfully detained and who could be set at large." *United States v. Reese*, 92 U.S. 214, 221 (1876).

2. A penal statute cannot carry with it the threat of erratic and arbitrary arrests and convictions. *Papa-*

christou v. City of Jacksonville, supra; Thornhill v. Alabama, 310 U.S. 88 (1940); *Herndon v. Lowry, supra; United States v. Reese, supra.*

This statute by subjecting one to threats of arbitrary and erratic arrests and convictions, by failing to give adequate notice, and by failing to prescribe specifically what conduct falls within the purview of the statute, sets a net large enough to catch all possible offenders and leaves it to the courts to say who could be rightfully detained and who shall be set at large, and is thus void for vagueness. See *United States v. Reese, supra.*

So amenable are the terms of the statute to subjective interpretation, the statute's application must perforce be capricious. Indeed, no legislative prescription really governs the enforcement of this penal statute. The statute is wholly subjective and unlimited in scope, thereby depriving Florida citizens of their most fundamental, constitutionally protected rights, to wit: those embodied by the First Amendment.

B. **Overbreadth**

The statute in question also violates the prohibition against overbreadth by proscribing legitimate First Amendment rights.

Florida Statutes §104.38 provides that "if a newspaper in its columns assails the personal character of any candidate . . ." the newspaper, unless it prints a reply, shall be guilty of a misdemeanor.

While some forms of assailment may in fact be subject to state regulation (such as libel and slander), Florida Statutes §104.38 does not distinguish between those forms of assailment which are subject to state regulation and those forms which are constitutionally protected. Therefore, the statute is overbroad on its face and invalid as violative of the First Amendment.

The overbreadth doctrine focuses directly on the need for precision drafting to avoid conflict with First Amendment rights. The doctrine rejects a "shot-gun approach" to barring unprivileged conduct where First Amendment privileged conduct is also swept within the ambit of the law. It is, after all, primarily the legislature's job to identify features of conduct which cause sufficient harm to public interest to warrant intervention. The key word here is "identify." Where a law fails to clearly "identify" conduct with such specificity as required in order that First Amendment freedoms are not curtailed, the law violates the overbreadth doctrine.

> "The objectional quality of . . . overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative power, but upon the danger of tolerating in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping or improper application."
>
> *NAACP v. Button*, 371 U.S. 415 at 432-433 (1963).

C. **Chilling Effect**

The newspaper's right to print what it wishes is protected by the First Amendment. If a newspaper is required, under the threat of the sanctions of the Florida Statute, to provide free space which it does *not* wish to provide and print words which it does *not* wish to print, it may very well be deterred from printing words it *does* wish to print. This chilling effect clearly destroys freedom of the press in its most basic sense.

This Court has repeatedly stated that:

> "The threat of sanction may deter . . . almost as potently as the actual application of sanctions."

NAACP v. Button, supra at 433.

The threat of sanction exerts a chilling effect upon the exercise of First Amendment rights regardless of the chance of success of the threatened sanction, *Dombrowski v. Pfister*, 380 U.S. 479 at 487 (1965). See e.g. *Wolf v. Selective Service Local Board #16*, 372 F.2d 817 (2d Cir. 1967) (Complainant faced with possible induction into the armed services following reclassification after a peaceful protest); *Baggett v. Bullitt*, 377 U.S. 360 (1964) (State employee might have to curb protected activities in order to swear to state loyalty oath); *Speiser v. Randall*, 357 U.S. 513 (1958) (State cannot impose a tax burden for refusal to swear to a loyalty oath, due to its deterrent effect); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963) (Disclosure of organizational membership list chills First Amendment right of free association).

A penal statute which is subject to state as well as private enforcement and thereby deters the exercise of First Amendment rights, is unconstitutional because of its chilling effect. Florida Statutes §104.38 is apparently subject to both state as well as private enforcement. The deterring effect on a newspaper's valid exercise of First Amendment freedom of press is brought about by the possibility of a conviction (state enforcement) and injunction or damages (private enforcement) when a newspaper seeks to assert its First Amendment right.

Recent developments in the law of libel stand as an example of how this court may modify subsequent standards to lessen the chilling effect of common law regulation of the dissemination of ideas. *New York Times v. Sullivan, supra; Rosenbloom v. Metromedia, supra.* This court has utilized the concept of chilling to modify the standards to be applied in a libel claim against a public person. The quote "chilling effect" concept supports the view that a public person could prevail in a law suit claiming that certain statements concerning his public actions were libelous only upon a showing that such statements were made with "actual malice" . . . i.e. knowledge of their falsity — or with reckless regard for the truth. This Court has reasoned that would-be critics should not be deterred by the fear of being sued for libel. If they were so stifled, the exercise of First Amendment rights would be hampered.

D. Less Drastic Alternative Doctrine

It is clear that even where the state has a recognized interest in regulating personal freedoms, it must, where those freedoms are fundamental and constitutionally pro-

tected, pursue the least drastic course in furthering its interest. *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Shelton v. Tucker*, 364 U.S. 479 (1960); *NAACP v. Button*, *supra*.

The doctrine, first developed where the government sought to regulate freedom of speech, has been expanded to mean that whenever the freedoms to be affected are personal and fundamental, the state is obligated to pursue reasonable alternatives which impose a lesser, rather than a greater, infringement. *Dunn v. Blumstein*, 405 U.S. 330 (1972) (the right to vote); *Shapiro v. Thompson*, *supra* (the right to travel); *Griswold v. Connecticut*, *supra* (marital privacy).

In *Dunn* this Court acknowledged the state's interest in regulating the franchise. Nonetheless, in rejecting Tennessee's durational residence requirement, this court admonished:

> "It is not sufficient for the state to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the state cannot choose means which unnecessarily burden or restrict constitutional protected activity. Statutes affecting constitutional rights must be drawn with precision, and must be tailored to serve the legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a state may not choose the way of greater interference. If it acts

> at all, it must choose less drastic means." (Citations omitted.)
>
> *Id*, at 343.

The interest of the State of Florida in maintaining conditions conducive to free and fair elections.

> "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose."
>
> *Shelton v. Tucker*, *supra*, at 488.

There are less drastic alternatives which the State of Florida may pursue.

Obviously, the State of Florida has not sought to avail itself of other less drastic alternatives than interference with freedom of the press.

E. The Missing Requirements of "Truth" and "Fair Comment"

This court has mandated that freedom of the press prohibits any recovery in a libel action unless the Plaintiff shows by clear and convincing proof that the newspaper account was false and was published with actual malice, defined as knowledge by the publisher of falsity or reckless disregard for the truth. *Rosenbloom v. Metromedia, Inc., supra; New York Times Company v. Sullivan, supra.*

Since compulsory printing inhibits freedom of the press at least as much as civil damages, clearly freedom of the press prohibits any legislatively required right to reply, particularly so when libel is not involved. But if some "Right-To-Reply" Law may somehow be constitutional, then a replyer must convincingly demonstrate the newspaper's knowledge of falsity or reckless disregard for the truth. Yet the Florida Statute renders "truth" and "fair comment" totally meaningless and completely unavailable to newspapers as a defense despite the case law cited above.

CONCLUSION

For the foregoing reasons, Amicus respectfully submit that any "Right-To-Reply" Law is inconsistent with the basic command of the First Amendment and this particular statute must also fall due to the other constitutional infirmities set forth herein.

Respectfully submitted,

JONATHAN L. ALPERT
IRMA ROBBINS FEDER
RICHARD YALE FEDER
WARREN S. SCHWARTZ
c/o American Civil Liberties
Union of Florida
19 West Flagler Street
Miami, Florida 33130
Attorneys for Amicus Curiae

By_____

CERTIFICATE OF SERVICE

I, JONATHAN L. ALPERT, as a member of the Bar of the Supreme Court of the United States, hereby certify that a true and correct copy of the foregoing Brief of the American Civil Liberties Union of Florida, *Amicus Curiae*, was mailed by United States Mail this ____ day of February, 1974, to each of the following:

Mr. James W. Beasley, Jr.
Paul and Thompson
1300 First National Bank Building
Miami, Florida 33131
Attorney for Appellant

Mr. Tobias Simon
1492 South Miami Avenue
Miami, Florida 33130
Attorney for Appellee

JONATHAN L. ALPERT